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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 **IN RE: BARD IVC FILTERS PRODUCTS**
10 **LIABILITY LITIGATION**

MDL No. 2641

11 This Order Relates to:

12 Pamela Noterman,

No. CV-15-01714-PHX-DGC

13 Plaintiff,

ORDER

14 v.

15 C.R. Bard, Inc., et al.,

16 Defendants.
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18 Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc. (“Bard”) filed a
19 motion to dismiss Plaintiff Pamela Noterman’s complaint. Doc. 1072. Plaintiff failed to
20 respond. During the March 31, 2016 case management conference, the Court excused
21 Plaintiff’s failure to respond to Bard’s motion, and allowed Plaintiff leave to file a motion
22 to amend her complaint. Plaintiff filed her motion, which Bard opposed. Docs. 1324;
23 1475. Plaintiff did not file a reply. For the following reasons, the Court will deny
24 Plaintiff’s motion to amend and grant Bard’s motion to dismiss.

25 **I. Background.**

26 On November 5, 2009, Plaintiff Pamela Noterman was implanted with a Bard
27 inferior vena cava filter. Doc. 1324-2 at 16, ¶¶ 51-52. On February 16, 2011, Plaintiff
28 presented to a medical facility with chest pain, where she learned that the filter had

1 fractured. *Id.* at ¶ 53. The filter was subsequently removed. *Id.* at ¶¶ 54-55. Plaintiff
 2 died on May 6, 2014. Doc. 1475-1 at 2.

3 On February 13, 2015, Plaintiff's counsel filed this lawsuit in Florida state court.
 4 Doc. 1324-2 at 2. Bard removed the case to the Middle District of Florida, and the U.S.
 5 Judicial Panel on Multidistrict Litigation transferred the case to this Court for inclusion in
 6 this MDL. *See* Docs. 1 (notice of removal), 10 (conditional transfer order), in *Noterman*
 7 *v. C.R. Bard, Inc.*, No. 2:15-cv-01714-DGC (M.D. Fla. July 1, 2015). Bard became
 8 aware of Plaintiff's death when it received her plaintiff profile form on February 15,
 9 2016. Doc. 1475 at 3. On March 11, 2016, Bard filed its motion to dismiss. *See* Doc.
 10 1072. On April 4, 2016, Plaintiff's counsel requested leave to amend Plaintiff's
 11 complaint to substitute her husband and personal representative, John Noterman, for her.
 12 *See* Doc. 1324.

13 **II. Capacity to Sue.**

14 “Only a real party in interest has the capacity to bring a lawsuit.” *In re Engle*
 15 *Cases*, No. 3:09-cv-10000-J-32JBT, 2013 WL 8115442, at *2 (M.D. Fla. Jan. 22, 2013)
 16 (“*In re Engle Cases I*”), *aff'd*, 767 F.3d 1082 (11th Cir. 2014) (quoting *Tennyson v.*
 17 *ASCAP*, 477 F. App'x 608, 610 (11th Cir. 2012) (unpublished) (citing Fed. R. Civ. P.
 18 17(a), (b)).¹ “The capacity doctrine relates to the issue of a party's personal right to
 19 litigate in a federal court.” *Glickstein v. Sun Bank/Miami, N.A.*, 922 F.2d 666, 670 (11th
 20 Cir. 1991), *abrogated on other grounds by Saxton v. ACF Indus., Inc.*, 254 F.3d 959
 21 (11th Cir. 2001) (quotation marks and citation omitted). “[A] party must have a legal
 22 existence as a prerequisite to having the capacity to sue or be sued.” *In re Engle Cases I*,
 23 2013 WL 8115442, at *2 (quoting *Adelsberger v. United States*, 58 Fed. Cl. 616, 618
 24 (Fed. Cl. 2003)). “Indeed, a deceased individual cannot be a party to a lawsuit.” *Id.*
 25 (citing *Xtra Super Food Ctr. v. Carmona*, 516 So. 2d 300, 301 (Fla. Dist. Ct. App.

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 27 ¹ Because an MDL transferee court applies the substantive law of the transferor
 28 forum, the Court applies the substantive law of the Middle District of Florida. *In re*
Zicam Cold Remedy Mktg., Sales Practices, & Prods. Liab. Litig., 797 F. Supp. 2d. 940,
 941 (D. Ariz. 2011) (citing *Ferens v. John Deere Co.*, 494 U.S. 516, 525 (1990)).

1 1987)); *see also* *Adelsberger*, 58 Fed. Cl. at 618 (collecting cases). A lawsuit filed in the
 2 name of a deceased individual is therefore a nullity, which presents a jurisdictional defect
 3 that cannot be saved by substitution or amendment. *In re Engle Cases I*, 2013 WL
 4 8115442, at *2, 4.

5 In *In re Engle Cases I*, a lawyer represented thousands of individual plaintiffs in
 6 suits against a number of tobacco companies. *Id.* at *1. Among those cases were 521
 7 cases where the complaint had been filed after the plaintiff had already died, but the
 8 complaint alleged personal injury claims. *Id.* After repeated attempts to cull the docket
 9 of cases with non-viable claims, the court issued a questionnaire to be filled out under
 10 oath to determine which cases had viable claims. *Id.* Upon reviewing the questionnaires
 11 and learning of these cases, defendants moved for dismissal of the 521 cases with
 12 predeceased plaintiffs. *Id.* Plaintiffs sought leave to amend the complaints to substitute
 13 parties and allege wrongful death claims under Rules 15 and 17 of the Federal Rules of
 14 Civil Procedure, arguing that the error was simply “a pleading deficiency related to
 15 capacity of the plaintiff, rather than a jurisdictional defect.” *Id.*

16 The court found that the “521 personal injury actions not only name parties
 17 without capacity, but allege personal injury claims that abated when the smokers died.”
 18 *Id.* at *3 (citing Fla. Stat. § 768.20 (“When a personal injury to the decedent results in
 19 death, no action for the personal injury shall survive, and any such action pending at the
 20 time of death shall abate.”)). The court acknowledged

21 that under certain circumstances when the proper cause of action is alleged
 22 but the plaintiff lacks capacity, or where the plaintiff dies after the
 23 complaint has been filed, substitution and amendment may be proper under
 24 Rules 17, 25, or 15. *See* Fed. R. Civ. P. 15, 17, 25. However, such
 25 circumstances do not exist here. In these cases, the plaintiffs died *before*
 26 counsel filed suit. Further, the complaints allege a personal injury cause of
 27 action that was not viable in the first place. Regardless of the reasons and
 28 authorization for these filings, a personal injury suit cannot be commenced
 by a dead person and thus, these claims are nullities that must be dismissed.
 As such, no substitution or amendment can save these claims.

Id. at *4 (emphasis in original). The court dismissed the 521 cases without prejudice. *Id.*

1 at *6. The Eleventh Circuit affirmed the district court's order, but did so without
 2 deciding "whether a personal injury claim brought on behalf of a deceased individual has
 3 any legal effect, such that it can later be amended." *In re Engle Cases*, 767 F.3d 1082,
 4 1108 (11th Cir. 2014) ("*In re Engle Cases II*").

5 Plaintiff's motion is supported by few facts. And the few facts provided do not
 6 adequately explain why counsel filed a personal injury complaint on behalf of a Plaintiff
 7 who had died nine months before the complaint was filed. Plaintiff's counsel explains
 8 that "[i]n an abundance of caution to protect plaintiffs' [sic] Statute of Limitations, an
 9 action was commended [sic] on or about February 13th, 2015, by the filing of a
 10 Complaint." Doc. 1324 at 4, ¶ 3. Plaintiff's counsel states that "[t]hereafter Parker
 11 Waichman LLP was notified that plaintiff-decedent died on May 6, 2014." *Id.* at ¶ 4.
 12 Plaintiff's counsel does not explain how he filed a complaint without first speaking with
 13 his client. Nor does he explain why he had not communicated with his client during the
 14 nine-month period between her death and the filing of the complaint. Nor does he
 15 explain why he did not take immediate action to correct the deficient pleading upon
 16 learning of her death. Plaintiff's counsel summarily concludes that "Plaintiff should be
 17 allowed to amend the original complaint in the above-captioned case herein to substitute
 18 and add husband of plaintiff-decedent Pam W. Noterman, John Noterman as Personal
 19 Representative of the Estate of Pam W. Noterman, in place of and stead of Pamela
 20 Noterman." *Id.* at ¶ 5.

21 Plaintiff's motion is supported by virtually no legal authority.² The solitary
 22 authority Plaintiff cites is "Rule 15(2)" of the Federal Rules of Civil Procedure. Doc.
 23 1324 at 3-4, ¶ 3. Presumably, Plaintiff is referencing Rule 15(a)(2), which allows a party
 24 to amend her complaint with the opposing party's consent or with leave of the court. But

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 26 ² Because of this dearth of legal authority, Bard asserts in a footnote that
 27 Plaintiff's motion violates LRCiv 7.2(b), which requires the moving party to "serve and
 28 file with the motion's papers a memorandum setting forth the points and authorities relied
 upon in support of the motion." Doc. 1475 at 2 n.1. As a remedy, Bard requests leave to
 file a surreply to address any new arguments raised in Plaintiff's reply brief. Because
 Plaintiff declined to file a reply brief, Bard's request to file a surreply is moot.

1 Plaintiff cites no additional legal authority to explain why the Court should grant Plaintiff
2 leave under Rule 15(a)(2) to file an amended complaint. Plaintiff's counsel makes no
3 genuine attempt to counter Bard's legal arguments despite having had two opportunities
4 to do so.³ Nonetheless, the Court will address the arguments that can be inferred from
5 Plaintiff's motion to amend, which, as discussed above, is largely devoid of substance.

6 Although the motion to amend only references Rule 15, Plaintiff's request
7 primarily implicates Rule 17 of the Federal Rules of Civil Procedure. A plaintiff's
8 request to substitute the real party in interest invokes Rule 17(a)(1), which requires that
9 an action be prosecuted in the name of the real party in interest, and Rule 17(a)(3), which
10 permits substitution of the real party in interest in certain circumstances. "[M]ost courts
11 have interpreted . . . Rule 17(a) as being applicable only when the plaintiff brought the
12 action [in the name of the wrong party] as a result of an understandable mistake, because
13 the determination of the correct party to bring the action is difficult." *In re Engle Cases*
14 *II*, 767 F.3d at 1109 (alteration in original; citations omitted); *see also* Fed. R. Civ. P. 17
15 (Advisory Comm. Notes to 1966 Amend.). Substitution is not appropriate in this case.
16 Plaintiff's counsel could have readily determined the correct party to bring this action had
17 Plaintiff's counsel investigated the basic facts underlying Plaintiff's claims prior to filing
18 the complaint. If there is an understandable mistake as to why the proper party could not
19 be discovered, Plaintiff's counsel has not even attempted to convey that information to
20 the Court. Plaintiff's request to substitute parties under Rule 17(a)(3) is therefore denied.

21 Plaintiff's motion to amend also implicates Rule 15(a)(2). Plaintiff's motion does
22 not clearly state that the requested amendment includes a new claim. But in reviewing
23 the proposed amended complaint attached to the motion, Plaintiff has added a "survival
24 action" claim. Doc. 1324-4 at 33-34. Because the Court denied the motion to substitute,
25 it will also deny the motion to amend under Rule 15(a)(2).

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27 ³ Before Plaintiff filed her motion to amend, Bard filed its motion to dismiss.
28 Bard's motion is substantially similar to its response to Plaintiff's motion to amend.
Docs. 1072; 1475. But in her motion to amend, Plaintiff did not address any of the
arguments Bard made in its motion to dismiss. Nor did she address Bard's arguments in
a reply brief; Plaintiff elected not to file one at all.

1 The Court finds a number of parallels between this case and *In re Engle Cases I*.
 2 In this case, Plaintiff died on May 6, 2014. Doc. 1475-1 at 2. Over nine months later,
 3 Plaintiff's counsel filed a complaint against Bard alleging personal injury claims,
 4 including that Plaintiff "is no longer able to sustain the active lifestyle that she enjoyed
 5 prior to the time when she was treated with the G2X Filter," and that she "suffered and
 6 continues to suffer from physical and emotional pain." Doc. 1324-2 at 16-17. The
 7 complaint did not indicate that Plaintiff had already died. Nor was it filed by her
 8 personal administrator. This pleading deficiency only came to light when Bard received
 9 Plaintiff's profile form. To date, Plaintiff's counsel has provided essentially no
 10 explanation for the pleading deficiency or the lack of diligence. Nor has Plaintiff's
 11 counsel provided any legal authority to support Plaintiff's position. Therefore, as in *In re*
 12 *Engle Cases I*, Plaintiff's complaint was a legal nullity when it was filed and remains so
 13 today. This issue cannot be cured by substitution or amendment. The Court concludes
 14 that Plaintiff's motion to amend her complaint must be denied and the case must be
 15 dismissed with prejudice.

16 **IT IS ORDERED:**

- 17 1. Defendants' motion to dismiss (Doc. 1072) is **granted with prejudice**.
- 18 2. Plaintiff's motion to amend (Doc. 1324) is **denied**.

19 Dated this 31st day of May, 2016.

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 24 David G. Campbell
 25 United States District Judge